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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 404

POSTAL TELEGRAPH-CABLE COMPANY,
Appellant,

vs.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEE.

RALPH M. SHAW,
GEORGE A. KELLY,
Attorneys for Appellee.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 959

POSTAL TELEGRAPH-CABLE COMPANY,
Appellant,

vs.

CHICAGO GREAT WESTERN RAILROAD COMPANY,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT.

On December 26, 1888, the Chicago, St. Paul & Kansas City Railway Company, the predecessor of the appellee, and the appellant entered into a contract for the *mutual exchange of services.* (Cont. Tr., 50, 56.)

The Railway Company agreed:

1. To turn over the railroad's telegraph property and system to the telegraph company on January 1, 1889.

2. So far as it legally could, to assure to the telegraph company the exclusive right of way for telegraph purposes on and along its line.

3. To keep clear the right of way of all obstructions to the construction and maintenance of the telegraph lines and wires.

4. To furnish all labor necessary for the maintenance of the telegraph lines.

5. To furnish office room in its railway stations.

6. That its railway telegraph operators should handle the business of the telegraph company at all stations along the line of the railway except at such places as the telegraph company might establish a separate office.

7. That its employees in the performance of their duties in connection with the maintenance and operation of the telegraph lines should observe the rules and regulations of the telegraph company applicable thereto.

8. To transport free over its railway employees of the telegraph company when traveling upon business of the latter.

9. To transport and distribute free along the line of its railway all poles or other material and supplies for the construction, maintenance, renewal, repair and operation of the lines and wires covered by the agreement.

10. That (unless legally bound so to do) it would not transport men or materials for the construction or operation of a line of poles or wires or underground or other lines in competition with the lines of the telegraph company, except at and for its regular local rates.

11. That it would not furnish for any competing line

any facilities or assistance that it might lawfully withhold, nor stop its trains nor distribute material therefor at other than regular stations.

The Telegraph Company agreed:

1. To take possession of the telegraph property of the railway company on January 1, 1889, and thereafter,

2. To furnish all materials necessary for the maintenance and repair of said lines.

3. To furnish all apparatus necessary for operating the same.

4. To furnish all blank forms and stationery necessary for the transaction of a commercial telegraph business at all telegraph offices along the line of the railway.

5. If requested by the railway company to promptly construct a telegraph line upon any extension of railway which the railway company might make, and to string thereon two wires for the exclusive use of the railway company, if the business of the latter required it.

6. To pay to the railway company $87,000 in three equal payments of $29,000 on July 1, 1889, January 1 and July 1, 1890, respectively, and to give its promissory notes therefor with interest at 5 per cent. per annum.

7. To transmit free over its lines beyond the railway telegraph lines, business of the railway company to the extent of ten dollars per mile of railway per annum, including any extensions that might thereafter be made, such business to be charged at the regular rates of the telegraph company, and for this purpose,

8. To issue annual franks authorizing such free transmission of messages relating strictly to the railway or corporate business of the railway company originating at or destined to points on the telegraph com-

pany's lines within the United States, either upon or off the line of the railway.

9. If the telegraph business of the railway company beyond its lines should amount to more than ten dollars per mile of railway per annum, the excess should be paid for at one-half the regular rates of the telegraph company.

It was mutually agreed:

1. That the business of the railway company should have precedence over all other business upon wires set apart for its use, and that it should have the full use of all wires then in operation and of two wires upon any extensions of railway that might be made in case it should require the same, free of charge.

2. That until the railway company should find it necessary to have the sole use of said wires, the commercial business of the telegraph company should also be done over said wires.

3. If the railway company should require the use of an additional wire or wires for its business over and above the two wires mentioned, the same should be paid for by the railway company.

4. If the telegraph company required an additional wire or wires for its commercial business, the same should be paid for by the telegraph company.

5. In either case such additional wire or wires should come in under the terms of the contract as to maintenance, repairs and renewals.

6. If the two wires or either of them set apart for the use of the railway company should at any time be unfit for use, the railway company should have the free use of such of the wires set apart for commercial business as

should be necessary to transact its business until the wires set apart to it should be put in fit condition for use.

7. That the railway company should not be responsible for any loss or damages that might arise from any neglect or failure in the transmission or delivery of messages.

8. That the railway company should not be liable to the telegraph company for any defalcation or embezzlement of moneys received for the telegraph company by the railway company's operators when such operators were acting as agents of the telegraph company.

9. Nor for any loss, damage or liability of any kind arising from any injury to persons in the employ of, or property belonging to the telegraph company while being carried free over the railway.

10. That the telegraph company should not be responsible for any loss or damages arising from or on account of any error, delay or default in the transmission or delivery of any message sent for the railway company under the agreement.

11. That the railway company should have the right to establish telegraph stations at such places along its line as it might deem necessary.

12. That at such stations the telegraph company agreed to supply the instruments, local batteries and blank forms and stationery for local business.

13. That the railway company should have the right to the free use of any patent right or any new discoveries or inventions that the telegraph company then owned or might thereafter own or use in its telegraph business so far as the same might be necessary and convenient for carrying on the telegraph business of the lines of the railway company.

14. That the agreement should be and continue in force for ninety-nine years from its date.

15. That in case of any disagreement concerning the true intent and meaning of any of its provisions, the subject of such differences should be referred to three arbitrators, one to be chosen by each of the parties and the third by the two thus chosen, and the decision of such arbitrators, or majority thereof, to be final and conclusive.

The contract was amended February 5, 1902, by canceling the seventh clause and substituting a clause whereby the telegraph company agreed to transmit free over its lines, beyond the railway telegraph lines, business of the railway company to the extent of $12 per mile of railway per annum. (Tr., 56.)

On the execution of the contract the telegraph company took possession of the telegraph lines of the railway company as provided therein and each party in all respects performed all things required in accordance with its terms until shortly after March 28, 1916, except as here next stated.

After the passage of the Hepburn Act in 1906 and prior to the passage of the Act of 1910, amending the Act to Regulate Commerce, and while the property now owned by the appellee was in the hands of the receiver of appellee's predecessor, the receiver, because of the Act of 1906, refused to transport free under the contract over its lines the employees of appellant when they were seeking to use the same to reach destinations off the line of the appellee.

The propriety of the receiver's interpretation of the contract under the Act of 1906 was questioned in court by the appellant (Tr., 39) and was sustained by an order

of court entered on May 4, 1910. (Tr., 71.) The appellant appealed from the decision. (Tr., 71.) *Within two months thereafter the Act of* 1910 *was passed.*

Section (1) of this act had two paragraphs which have a direct application to the controversy involved. The first paragraph provided:

> "That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services."

The second of these two paragraphs provided:

> "That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone and cable lines, and the officers, agents, employees and their families of other common carrier subject to the provisions of this act."

Immediately upon the passage of the Act of 1910 the Postal Company abandoned its appeal and both parties readopted the contract in its entirety and continued to adhere to and perform all of its provisions until March 28, 1916. (Tr., 71, 80, 81, 82.)

On June 8, 1912, the Interstate Commerce Commission, in its Conference Ruling No. 364, expressed the opinion that the Act of 1910, had changed the law. It held:

> "Under the Amendatory Act of June 18, 1910, it is provided 'That nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.' Upon inquiry, *Held,* That a railroad company and a telegraph company may exchange *services with respect to strictly company matters on the basis of their agreement.*"

On March 28, 1916, the Commission reversed its rul-

ing of June 8, 1912, and promulgated the following administrative ruling (Tr., 37):

> "Upon inquiry as to whether or not under the provision of Section 1, 'That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services,' a railroad may contract with a telegraph company (including in that term 'telephone, telegraph and cable companies'), to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the act, Held, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar serices; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier."

Thereupon appellant, pretending to take advantage of this ruling of the Commission, declined thereafter to continue the performance of the contract and immediately began the series of harassing suits referred to in the bill of complaint, relief from which was one of the remedies prayed for. (Tr., 3-9.)

In the District Court a decree was entered dismissing the bill for want of equity. (Tr., 96, 245 Fed., 592.) On appeal of the appellee the Circuit Court of Appeals for the 7th Circuit reversed the decree of the District

Court with instructions to grant the prayer of the bill. (Tr., 110, 249 Fed., 664.)

In view of the position now taken by the appellant the issue is reducible to a single question:

> "May a railroad company, subject to the Act to Regulate Commerce, transport free or at reduced rates employees or property of a telegraph company when such employees and property are engaged and are to be used in the construction and maintenance of 'off line' telegraph facilities, and may such railroad company lawfully accept from the latter the transmission free or at reduced rates of railroad telegrams which are destined to or originate at points beyond the lines of the railroad?"

POINTS AND AUTHORITIES.

I.

UNDER THE AMENDMENT OF 1910, TELEGRAPH, TELEPHONE AND CABLE COMPANIES WERE GIVEN THE UNRESTRICTED RIGHT TO CONTRACT WITH COMMON CARRIERS FOR THE EXCHANGE OF SERVICES. IF, HOWEVER, THERE CAN BE ANY REASONABLE DOUBT AS TO THE MEANING OF THE AMENDMENT, THE COURT WILL RECUR TO THE "PUBLIC HISTORY OF THE TIMES" WHEN THE ACT WAS PASSED IN ORDER TO ASCERTAIN THE REASON FOR, AS WELL AS THE MEANING, OF THE PARTICULAR PROVISIONS IN IT, AND WILL ASSUME THAT CONGRESS HAD SUCH "PUBLIC HISTORY" IN MIND.

U. S. v. *Union Pacific R. R. Co.*, 91 U. S., 72.
U. S. v. *Trans-Missouri Freight Association*, 166 U. S., 290.
U. S. v. *Chicago & N. W. Ry. Co.*, 157 Fed., 618.
Aldridge v. *Williams*, 3 Howard, 9.
Platt v. *U. P. R. R.*, 99 U. S., 48.
Church, etc., v. *U. S.*, 143 U. S., 457.
U. S. v. *Union Pacific*, 148 U. S., 562.
T. & P. Ry. v. *I. C. C.*, 162 U. S., 197.
Red, etc., Co. v. *Board, etc.*, 172 Fed., 695.
Standard Oil v. *U. S.*, 221 U. S., 1.
Goodrich, etc., v. *I. C. C.*, 190 Fed., 943.
Red, etc., Co. v. *Board, etc.*, 222 U. S., 380.
I. C. C. v. *Goodrich*, 224 U. S., 194.
Lapina v. *Williams*, 232 U. S., 78.
Tucker v. *Williamson*, 229 Fed., 201.
Woodward v. *Graffenried*, 238 U. S., 284.

II.

THE CONTRACT IS ENTIRE. THE COVENANTS TO BE PERFORMED ON ONE SIDE ARE INTERDEPENDENT WITH THOSE TO BE PERFORMED ON THE OTHER. THIS BEING TRUE, THE ILLEGAL PART, IF ANY, MAY NOT BE EXPUNGED WITHOUT DESTROYING THE WHOLE STRUCTURE OF THE AGREEMENT.

Trist v. *Childs*, 21 Wall., 441.

Chicago, I. & L. Ry. Co. v. *Southern Ind. Ry. Co.*, 70 N. E., 843.

Bank v. *Owen*, 2 Peters, 527.

Thompson v. *Thompson*, 7 Ves. Jr., 470.

U. S. v. *Dietrich*, 126 Fed., 671.

American Mercantile Exchange v. *Blunt*, 102 Me., 128.

Kahn v. *Wilhelm*, 177 S. W., 403.

Lowey v. *Granite Provident Assn.*, 8 Misc. N. Y., 319.

Foley v. *Speir*, 100 N. Y., 552.

Haynes v. *Rudd*, 102 N. Y., 372.

Schwepy v. *Stevens*, 177 Fed., 484.

Union Central Life Ins. Co. v. *Berlin*, 90 Fed., 779.

III.

A PROVISO OFTEN EXTENDS RATHER THAN LIMITS LEGISLATION.

Georgia R. R. & Banking Co. v. *Smith*, 128 U. S., 174-181.

Interstate Commerce Commission v. *Baird*, 194 U. S., 25-37.

American Express Co. v. *United States*, 212 U. S., 522.

IV.

THE WORD "EXCHANGE" (IN THE PROVISO OF THE ACT OF 1910) MEANS TO GIVE ONE THING FOR ANOTHER, WHATEVER IT BE, EXCEPT MONEY, IN THE LATTER CASE IT WOULD BE A SALE.

Civil Code of Louisiana, Article 2660.
Civil Code of California, Par. 1804.
Civil Code of North Dakota, Par. 6003.
Civil Code of South Dakota, Par. 1348.
Civil Code of Montana, Par. 5129.
Buffum v. *Merry,* 4 Fed. Cases, 605.
Coker v. *the State,* 8 Southern Rep., 875.
Cooper v. *the State,* 37 Ark., 412.
Meyer v. *Rouseau,* 47 Ark., 463.
Chapman v. *Hughes,* 134 Cal., 641, 657.
Forkner v. *The State,* 95 Ind., 406.
Beardsley v. *Cottrell & Babcock,* 43 Ia., 194.
State v. *Austin,* 23 Southern Rep., 34.
Laboree v. *Klosterman,* 33 Neb., 150.
Moran v. *James,* 20 Misc., 235.
Elwell v. *Chamberlin,* 31 N. Y., 611.
Jenkins v. *Mapes,* 41 N. E., 137.
Jermyn v. *Elliott,* 45 Atl. Rep., 950.
Vail v. *Strong,* 10 Vt., 457, 465.
Long v. *Fuller,* 21 Wis., 121.
Baltimore & Ohio R. R. Co. v. *Western Union Telegraph Co.,* 241 Fed., 162, affirmed, 242 Fed., 914.

V.

EVERY WORD OF THE STATUTE MUST BE GIVEN EFFECT PROVIDED IT DEVELOPS NO INTERNAL CONTRADICTION IN THE LAW AND DOES NOT THWART THE OBVIOUS INTENTION OF THE LEGISLATURE.

U. S. v. *Ninety-nine Diamonds*, 139 Fed., 961.

Van Patten v. *Chicago, M. & St. P. Ry. Co.*, 81 Fed., 545, 547.

ARGUMENT.

I.

UNDER THE AMENDMENT OF 1910, TELEGRAPH, TELEPHONE AND CABLE COMPANIES WERE GIVEN THE UNRESTRICTED RIGHT TO CONTRACT WITH COMMON CARRIERS FOR THE EXCHANGE OF SERVICES.

THE ATTEMPT TO READ INTO THE ACT THE WORDS "OFF LINE" OR "ON LINE" IS NOTHING MORE OR LESS THAN AN INEXCUSABLE INTERLOPATION OR ATTEMPT TO LEGISLATE BY THE COMMISSION.

IF, HOWEVER, THERE CAN BE ANY REASONABLE DOUBT AS TO THE MEANING OF THE AMENDMENT, THE COURT WILL RECUR TO THE "PUBLIC HISTORY OF THE TIMES" WHEN THE ACT WAS PASSED IN ORDER TO ASCERTAIN THE REASON FOR, AS WELL AS THE MEANING, OF THE PARTICULAR PROVISIONS IN IT, AND WILL ASSUME THAT CONGRESS HAD SUCH "PUBLIC HISTORY" IN MIND.

By the Amendment of 1910, Congress gave to telephone, telegraph and cable companies the right to contract with common carriers for an exchange of services. In the act, there is no qualification, limitation or restriction of the terms used. The meaning is clear, definite and certain.

If, however, we are in error as to this and there should be any reasonable doubt as to the meaning of the enactment and its purpose, the historical situation existing at the time of its passage, becomes important. This history is as follows:

1. The Act to Regulate Commerce was passed in 1887.
2. In 1906, Congress amended Section six thereof. As

amended, Section six provided, among other things, as follows:

> "No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges, upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge, or demand or collect, or receive a greater or less or different compensation for such transportation of passengers or property, * * * than the rates, fares, and charges which are specified in the tariff filed and in effect at the time."

3. In September, 1906, the Commission interpreted this provision of the act to mean that only money might lawfully be received in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith. (Conference Ruling No. 207, Tr., 30.)

4. In October, 1906, the Commission held that the law of 1906 did not prevent a carrier from giving free or reduced rate carriage over its own line to contractors for material, supplies and men for use in construction, improvement or renewal work on the line of that carrier. (Conference Ruling 208, Tr., 31.)

5. On December 21, 1906, the Commission in its report *"In the Matter of Railroad-Telegraph Contracts"* (12 I. C. C., 10) (Tr., 33), held that a telegraph service along the right of way of railroads was a necessary part of the latter's equipment and essential to its safe operation.

The Commission then said:

> "The Commission is of the opinion that the rulings above set forth are in exact conformity with the terms and spirit of the law. Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of railroads

> are *sui generis* and unlike any other contracts with carriers that have come to our attention. *So far as we can now see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely.* Nevertheless, the Commission knows of no provision of the law now in force which vests it with any authority, or any clause in the law that affords it a reasonable ground, to differentiate 'off the line' service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers." (Italics ours.)

The Commission further held that "such contracts with telegraph companies may lawfully be entered into," by railroad companies, and that in consideration of the construction, maintenance and operation of the telegraph line upon the right of way, which telegraph line the railroad company would otherwise be compelled, as an operating necessity, to construct and maintain, the carrier may accord to the telegraph company free or reduced rate transportation for the men, materials and supplies of the telegraph company required and necessary in connection with the construction, maintenance and operation of the telegraph lines upon such carrier's own right of way.

6. On June 3, 1907, the Commission promulgated its Administrative Ruling (No. 219) with respect to "Transportation of Men or Property for Telegraph Companies," in which it referred to and amplified such previous rulings and decisions. (Tr., 31.)

7. On November 15, 1907, the Commission announced that Administrative Ruling No. 219 would apply to telephone service, and called upon carriers that had not already done so to promptly file with the Commission copies of all contracts for telegraph or telephone service on their lines. (Tr., 32.)

8. Existing contracts between the various railroad companies and telegraph companies for the exchange of services were then filed with the Commission. (Tr., 73.)

9. The Commission, from time to time, in its annual reports, reported to Congress the rules and decisions above referred to. (Tr., 34, 36.)

10. In July, 1908, the United States Circuit Court for the Northern District of Illinois, Eastern Division, in *United States* v. *Chicago, I. & L. Ry. Co.,* 163 Fed., 114, held that only money might lawfully be received in payment for transportation. The case was subsequently affirmed by this court (219 U. S., 486).

11. The Congress also had recognized in legislation dating back as far as 1862 the close and necessary relation existing between railroads and telegraph companies and the fact that telegraph facilities are essential to the operation of railroads.

Pacific Railroad Act of July 1, 1862, 12 Stat., at Lg. 489.

Texas & Pacific Railroad Act March 3, 1872, 16 Stat. at Lg. 573.

The Act approved March 2, 1889, 30 Stat., at Lg. 990.

The Act of February 28, 1902, 32 Stat., at Lg. 43.

12. Contracts of the character herein involved had also been the subject of examination by the courts.

U. S. v. *Union Pacific Ry. Co.,* 160 U. S., 1.

St. Paul, M. & M. Ry. Co. v. *Western Union Telegraph Co.,* 116 Fed., 497.

U. S. v. *Northern Pacific R. R. Co.,* 120 Fed., 546.

Western Union Telegraph Company v. *Pa. R. R. Co.,* 195 U. S., 540.

Western Union Telegraph Co. v. *Pa. R. R. Co.,* 129 Fed., 849.

13. It had likewise been a matter of common knowledge that railroad companies required and enjoyed unlimited telegraphic service in the operation of their railroads and the telegraph companies enjoyed the use of the rights of way of the railroad companies throughout the country for the construction and maintenance of their lines, and that in small places the only telegraph service afforded to the public was that furnished at railroad stations.

There is no room for doubt but that Congress was familiar with and had all the foregoing history in mind when it passed the Amendment of 1910. Every railroad in the United States had a contract similar to those presented to the court in the cases at bar. The validity of such contracts had never been questioned prior to the Act of 1906. The legality of the exchange of so-called "on line" services had never been questioned even after the Act of 1906 and still obtained when the Act of 1910 was passed. The Commission had ruled ("*In the Matter of Railroad-Telegraph Contracts*") as to "off-line" services, as follows:

> "So far as we can now see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely." (Tr., 33.)

But because of the Act of 1906 the *full performance* of such contracts had been suspended temporarily pending litigation. This was the situation when the amendment of 1910 was adopted, as follows:

> "That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services."

The practical interpretation placed on this amendment

immediately after its adoption is at least persuasive, if not conclusive.

The litigation between the Western Union Telegraph Company and the Baltimore & Ohio Railroad Company in the Second Circuit, involving the question whether the Act of 1906 invalidated in any respect existing contracts, was abandoned.

The litigation involving the same question in the Seventh Circuit, which was on its way to this court, was abandoned. Both railroads and telegraph companies assumed that the Act of 1910 had removed all doubt as to the legality of these intercorporate contracts.

The performance of such contracts, which had been temporarily interrupted pending litigation after the Act of 1906, was immediately resumed. Such operation had been in full force and effect for two years when the Commission gave the sanction of its approval to this practical interpretation by its conference ruling 364, which is as follows:

> "Under the amendatory Act of June 18, 1910, it is provided 'That nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.' Upon inquiry, Held, *That a railroad company and a telegraph company may exchange services with respect to strictly company matters on the basis of their agreement.*" (Italics ours.)

So the matter remained as between the railroad companies and the telegraph companies until, for some reason beyond the ken of any human mind, the Commission reversed itself.

II.

THE CONSIDERATION OF THE AMENDMENTS CONTAINED IN THE ACT OF 1910.

(a) *As to the Language of the Act:* In considering this subject one is immediately confronted with the fact that here is no room for interpretation. The act, for the first time in the history of the country, subjects telegraph, telephone and cable companies to the provisions of the Act to Regulate Commerce and designates them as common carriers. It then provides that the rates of transportation to be charged by all common carriers shall be just and reasonable and then, in express terms, provides that the act shall not be construed to prevent telephone, telegraph and cable companies from

> "entering into contracts with common carriers for the exchange of services."

The phrase "entering into contracts" is unlimited in its scope and is as broad as the power to contract. Nothing is said about "on line" or "off line" or "in the air" or "under the ground." Wherever or whenever common carriers engage in the performance of a service for each other, they are permitted under the terms of the act to exchange such performance each with the other without limitation as to place, price or volume.

Not only so, but by the express terms of the act, it is provided that the act shall not be construed so as to prohibit the privilege of

> "passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such cable, telegraph and telephone companies" (irrespective of the basis of exchange) "with the officers, agents and employees and their families of other common carriers."

With such language injected into an act by an amendment, after the history of interstate commerce legislation in this country as above narrated, and the public agitation of the subject for more than a quarter of a century, why should there now be any doubt as to the meaning of this broad and comprehensive language?

(b) *As to the Proviso:* It will not do to say, as the appellant suggests, that because the paragraphs of the statute above quoted are contained in provisos that therefore they are limitations upon the language previously used. This court has had occasion to hold frequently that the language in a proviso often shows the legislative intent to bring in new matter rather than to limit or explain that which has gone before.

> *American Express Co.* v. *U. S.*, 212 U. S., 522-534.
>
> *Georgia Banking Co.* v. *Smith*, 128 U. S., 174.
>
> *I. C. C.* v. *Baird*, 194 U. S., 35, 36, 37.

Each statute, of course, depends upon its own terms and the provisos will be given such construction as is consistent with the legislation under consideration. In the Act of Congress now under consideration one paragraph provided for the exaction of only just and reasonable charges. Another paragraph of the act as amended provided that only money might be received in exchange for transportation. Still another prohibited any departure from published tariff rates.

To relieve the common carriers having these contracts, both from the provisions requiring just and reasonable charges and also from the provision providing only for the exchange of transportation for money, Congress provided:

> "that nothing in this act shall be construed to prevent contracts for exchange of services."

By this proviso, so far as the contracts of carriers with each other are concerned, the provisions of the act for just and reasonable charges, for payment only in money for transportation and prohibiting the "departures from published tariff rates" were abrogated. The carriers were left free to make contracts with each other most consistent with their necessities as they had done prior to the original act in 1886.

(c) *As to the Word "Exchange":* It is contended by appellant that the exchange of services provided for in the act must be an exchange calculated "at regular rates." Here the appellant seeks to inject or interpolate some word or words into the act which are not there to be found. To say that "the exchange of services" provided for in the act must be "at regular rates" is to destroy the privilege of exchange. This follows, because the exchange of services at regular rates is nothing more or less than a sale of service for money. However, the act itself provides not for exchange of services at regular rates, but *for exchange of services,* meaning clearly thereby an exchange of services upon terms upon which each of the parties may agree, taking into account all of the various considerations passing from each of the parties to the other. The word "exchange" has a clearly understood and definite meaning, not only in ordinary conversation, but in legislation and decisions of the courts. It means the giving of *one thing for another.* It excludes the idea of first measuring the respective things in money values and then settling or paying any difference.*

The absurdity of appellant's argument and indeed of the 1916 interpretation of the Commission is made con-

*Authorities in the decision *B. & O.* v. *Western Union Telegraph Co.*, 241 Fed., 162, affirmed 242 Fed., 914, followed by the Circuit Court of Appeals in the Seventh Circuit in the case at bar.

spicuous by its utter lack of consistency. Both the appellant and the Commission concede that common carriers may contract with each other for "on line" service, but it may well be asked where is there anything in the act to indicate that Congress was especially concerned with so-called "on line" service? Indeed, the act itself excludes any possible interpretation of this kind.

(d) *As to Cable Companies:* To emphasize what the act means, the language is:

> "That nothing in this act shall be construed to prevent telephone, telegraph, and *cable* companies from entering into contracts with common carriers, for the exchange of services." (Italics ours.)

The Great Western Railroad Company has its eastern termini in Chicago and its western termini in Kansas City, Omaha, Minneapolis and St. Paul. It may well be asked how the Great Western Railroad Company or any other railroad in the United States could enter into a contract for exchange of "on line" services with a cable company? To propound the inquiry is to propound an absurdity. But—it is clear that cable companies have the right to exchange services with other common carriers and likewise that other common carriers have the right to contract for exchange of services with cable companies.

Again—according to the interpretation of the Commission and the one now urged by the appellant—there can only be an exchange for services rendered between a railroad company and one of the other carriers mentioned in the act when running along a common right of way. The burden is upon the appellant to show to the court how railroad companies and cable companies could occupy a common right of way. Appellant's interpretation would confer on railroad and cable companies the extraordinary valuable privilege of contract-

ing with each other, but at the same time of only being permitted to make contracts for the performance of impossible conditions. It is a cardinal rule of statutory interpretation that every word of the statute be given effect, provided it develops no internal contradiction in the law and does not thwart the obvious intention of the legislature. Authorities upon this point are so numerous that their citation is superfluous.

The interpretation placed upon the statute by the appellant and Interstate Commerce Commission flagrantly violates this cardinal principle of statutory interpretation. It not only injects into the statute words that are not there, but it gives no meaning at all to the word "cable."

(e) *As to the Right to Contract:* Not only does the interpretation urged by the appellant emasculate the word "cable," but it also destroys the meaning of the word "contract." The amendment was not needed to accomplish the result contended for by appellant. Appellant's interpretation of the act is nothing more or less than a bookkeeping transaction.

Under the law, prior to the enactment of the amendment, the appellant could send telegrams for the appellee at its published tariff rates and the appellee could carry merchandise for the appellant at its published tariff rates, and each could pay the other for the bills of the other by check, or the balance could be paid by the debtor corporation. No law has ever prohibited such a transaction. It required no statutory enactment to authorize it. To give to the statute such an interpretation is to say that the statute accomplished nothing at all, and added nothing to the law. Courts do not indulge in such methods of statutory interpretation. The courts will assume that a statutory enactment is made for a purpose.

III.

(f) *As to the relation of the amendment of* 1910 *with respect to free transportation, to the controversy presented by the cases at bar:* The lack of logic of the appellant's position is further illustrated when one considers the second amendment to the Act of 1910, above referred to.

The appellant's position is that the appellant has the right to refuse to carry out its obligations under the contract because it is illegal for the appellant to give free or reduced "off line" services to the officers and agents of the appellee. The inference is that if it were legal to give such service the appellant would not be in court seeking to escape from the obligations of the contract which it made more than a quarter of a century ago. But as a matter of fact, Section (1) of the act confers upon the appellant the privilege to render *free service to any officer, agent or employee of the appellee at any time or place and for any purpose whatsoever.* The appellant is, therefore, placed in this position: There is no question but that under the act, irrespective of the contract, the appellant could perform for *no consideration* all of the services which it undertook by the contract to perform. How, then, can the appellant be heard to say that the contract is illegal, because under the contract it undertook to perform services for nothing which the law says it has the right to give for nothing, or without consideration?

As a matter of fact, however, there is no *free* service under the contract, though it would be lawful if it were given. As has frequently been said, all of the services

and all of the considerations passing from one party to the other is the real consideration for all of the services and all of the considerations passing from the other party to it.

III.

It is suggested in appellant's brief that the appellant gives $8,000 free telegraphic service a year because, as appellant says, the amount of telegraphic service measured in terms of cash rendered by the appellant to the appellee exceeds the amount of transportation furnished by the appellee to the appellant, both measured in terms of tariff rates.

The argument amounts to nothing; *ex nihilo nihil fit.*

The free transportation furnished by the appellee to the appellant may not by the terms of the contract be set off against the so-called free service rendered by the appellant for the appellee. All of the consideration passing under this contract from the appellee to the appellant is the measure of all of the consideration passing under this contract from the appellant to the appellee. No one part of this contract may arbitrarily be selected by the appellant and set off against some arbitrarily selected consideration passing from the appellee to the appellant for the purpose of destroying all or any part of the contract. The contract is an entire contract. The covenants to be performed on one side are interwoven and interdependent with those to be performed on the other.

An examination contained in the opening statement of facts of this brief of the various considerations passing from each party to the other discloses how complicated and interwoven the mutual considerations are. As was

said by the Circuit Court of Appeals of the Seventh Circuit:

> "So intertwined and interdependent are the reciprocal obligations and undertakings that no part of the contract is separable from the other."

Counsel will not be heard to contend, as he does on page 49 of his brief, that by sustaining this contract as an entirety the Postal Telegraph Company will bear an operating expense of $7,000 or $8,000 a year for the transmission of telegrams for the railroad company. The statement confutes itself, because as the appellee respectfully submits, to take away from it this consideration passing from the appellant to it is to take away from it one of the valuable considerations which influenced it to enter into the contract. It is in fact to destroy the contract.

IV.

Conclusion.

The appellant, on page 36 of its brief, makes a gratuitous reflection upon the Court of Appeals for the Seventh Circuit by stating that the court merely followed the decision of the Court of Appeals for the Second Circuit. The appellant seeks to avoid the effect (if any) which this court may attach to the decisions of the Circuit Court of Appeals of the Second Circuit and of the Seventh Circuit by reflecting upon the good faith of the proceedings in the former Circuit, and upon the faithful performance of duty by the judges of the court in the latter Circuit. (Appellant's Brief, 33, 34, 35.)

Referring to the case in the Second Circuit the appellant states:

> "No suggestion was made to that court by either

party that this so-called exchange of free service was contrary to public interest."

As the record in that case discloses, the Interstate Commerce Commission appeared in that case and joined with the telegraph company in the hearing. So far as appellant's suggestion is concerned, it is sufficient to say, that the Interstate Commerce Commission had already reported to Congress as follows:

> "Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of railroads are *sui generis* and unlike any other contracts with carriers that have come to our attention. So far as we can now see, *the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely.*" (Italics ours.)

So far as the gratuitous reflection upon the Circuit Court of Appeals of the Seventh Circuit is concerned, the record in the Western Union—B. & O. case in this court shows that when a motion was made to advance that case for argument the Postal Company, by its counsel, appeared before the bar of this court and asked to have its argument deferred until the case from the Seventh Circuit could reach the court, upon the ground that the Great Western-Postal case presented important facts not presented by the Western Union record.

In the Circuit Court of Appeals of the Seventh Circuit, the same representation was made by the same counsel for the purpose of expediting the case. This appears from the opinion of that court where the court says (Tr., 108):

> "As the Western Union case is pending in the Supreme Court, we have taken this case now only on the representations of the Postal Company that there are important facts in this record which were not adduced in the Western Union case and that it

would be advantageous to have both records before the Supreme Court at the same time.

We find no additional facts that in our judgment enlarge or change the questions for decision."

Thereupon, that court proceeded to consider and decide the case.

In addition to the reasons of the Circuit Court of Appeals of the Second Circuit for its decision, the Court of Appeals gave six additional grounds for reversing the decision of the District Court in the Seventh Circuit, and following the conclusion of the Court of Appeals of the Second Circuit.

The appellee respectfully submits that such reflections upon the good faith of the courts, unwarranted by any facts in the record, should not be encouraged.

Appellant sounds an alarm that if the contracts herein questioned are held to be legal and the Government should take over the telegraph companies under the provisions of the Post Roads Act, it would also have to assume the burden of all the alleged free service allowed the railroads under the contracts. Again, it is sufficient to say that if the contingency to which counsel refers should occur, the Government will be amply able and prepared to protect its interests.

It is, therefore, submitted that the decree of the Court of Appeals was correct and should be affirmed.

Respectfully submitted,

Ralph M. Shaw,
George A. Kelly,
Attorneys for Appellee.